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AND
BRIEFS

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In The

Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report Of The Special Master

ELEPHANT BUTTE IRRIGATION DISTRICT'S AMICUS CURIAE BRIEF IN SUPPORT OF THE STATE OF TEXAS

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INTEREST OF ELEPHANT BUTTE IRRIGATION DISTRICT

A. History of the District and Relevant Contracts

Elephant Butte Irrigation District ("EBID") is an irrigation district and a New Mexico quasi-municipal corporation,[1] duly incorporated and organized under New Mexico law, with its principal place of business in Doña Ana County, New Mexico.[2] EBID is governed by a nine-member board of directors, each of which is a farmer/landowner within one of nine member districts. EBID's powers, rights, and duties derive from the New Mexico Constitution, New Mexico Statutes, and all rights, benefits and privileges that derive from the Reclamation Act of 1902 and contracts with the United States. EBID was created pursuant to a New Mexico statute authorizing organization of an irrigation district to cooperate with the United States under Federal Reclamation law to provide water supplies from the

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[1] Pursuant to Rule 37.4 of this Court, as a political subdivision of the State of New Mexico and filing through its authorized law officer, EBID files this brief as *amicus curiae* without seeking consent of the parties or order of this Court. Counsel of record for all parties received notice ten days prior to the due date of the *amicus curiae's* intention to file this brief.

[2] On December 3, 2014, EBID filed a Motion for Leave to Intervene in this cause. In his First Interim Report, the Special Master recommended to this Court that EBID's Motion be denied. Proposed Intervenor EBID did not take exception to the Special Master's recommendation regarding EBID's Motion, but it does take this opportunity to impose upon this Court the significance of EBID's interest in these proceedings as it relates to the issues raised by the Exceptions filed by the Parties and Amici.

Lower Rio Grande for irrigation of lands in southern New Mexico. New Mexico Statutes, ch. 73, Art. 10, §73-10-16. *See* First Interim Report of Special Master ("Rep.") at P. 237. EBID assumed all of the rights and accepted all of the duties of its predecessor organization, the Elephant Butte Water Users Association ("EBWUA"). New Mexico Statutes, ch. 73, Art. 10, §73-10-45. The EBWUA, which was organized in 1905 by property owners situated along the Rio Grande in southern New Mexico, formed after the Reclamation Act was passed to assist the United States in appropriating and beneficially using water and managing the works for the New Mexico portion of what would become the Rio Grande Project ("Project").

Under authority provided by New Mexico Statute and Federal Reclamation law, EBWUA, and subsequently EBID, were authorized to enter into contracts with the United States for the construction, operation and maintenance of facilities that would develop water supplies for delivery to irrigators in southern New Mexico, and to construct, operate and maintain various facilities – canals, ditches, reservoirs, sites, water rights, rights-of-way, and other property necessary for this purpose. New Mexico Statutes, ch. 73, Art. 10, §73-10-16. Pursuant to this authority, the EBWUA entered into a contract with the U.S. Bureau of Reclamation for water deliveries from the Project, which Congress authorized in 1905. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814 (1905). EBWUA was dissolved when EBID was organized pursuant to authority of New Mexico law to cooperate with the United States in providing water for irrigation from the Lower Rio Grande and, as the

successor to EBWUA, EBID executed a contract with the United States on January 7, 1918. *Holguin v. Elephant Butte Irrigation District*, 575 P.2d 88, 90 (N.M. 1977). In 1938, again pursuant to statutory authority provided to EBID, it entered into another contract with the United States under which EBID provides water from the Project for water users in the Project area in New Mexico. 1938 Contract, Rep. DVD Doc. 12. Under the 1938 contract, EBID receives 88/155th of the water supply of the Project, which it delivers to constituent water users to irrigate 90,640 acres of land in New Mexico. Rep. 245.

EBID administers the Project in New Mexico pursuant to contract, and owns and operates the Project's distribution and drainage facilities in New Mexico. In 1971, EBID completed repayment of New Mexico's share of the construction costs for the Project and requested that the physical operations and maintenance of the Project be returned to the local users consistent with its repayment contracts. After EBID repaid its contractual obligation to the United States, Congress, in 1992, authorized the Secretary of the Interior to transfer to EBID the title to certain Project facilities in New Mexico, consisting of canals and drainage systems. Pub. L. No. 102-575, 106 Stat. 4705 (1992). In 1996, the Secretary of the Interior issued deeds that transferred title to the facilities covered by the Act of Congress to EBID. Thus, EBID owns and operates the Project distribution and drainage facilities in New Mexico.

The contracts that allowed the transfer to occur also required that an operating agreement among the Project participants be developed. This was especially

important since the Project, which had been operated in both states by the United States, was now going to be separately owned and operated by EBID and the Texas Irrigation District, El Paso County Water Improvement District No. 1 (EP1). In addition, arrangements needed to be made to assure that the operation of the Project (via the Operating Agreement) considered the Treaty with Mexico that governs the equitable distribution of the waters of the Rio Grande between the United States and the Republic of Mexico. This Treaty guarantees the Republic of Mexico 60,000 acre feet of Project water in a full allotment year. *Convention Between the United States and Mexico Providing for the Equitable Distribution of Waters of the Rio Grande for Irrigation Purposes*, May 21, 1906, 34 Stat. 2953 (1906) (1906 Treaty). In 2008, the United States, EBID and EP1 finally entered into the Operating Agreement settlement, as required by repayment contracts, and as necessitated by ongoing litigation regarding the allocation and delivery of water within the Project.

The 2008 Operating Agreement implemented two key changes to the allocation procedure. First, it provided the ability for each district to carry over unused allocation balance(s) from one year to the next in their own accounts. Secondly, it established the period 1951-1978 (the "D2" period) as the baseline for allocation of water to EP1, with EBID absorbing the impacts of any shortages in divertible water from that baseline for a given level of annual release from Caballo Reservoir. Thus, the 1938 contract allocated surface water between EBID and EP1, and the 2008 Operating

Agreement modified that procedure to ensure delivery of water to EP1 under current conditions of groundwater use in New Mexico.

The importance of the 2008 Operating Agreement cannot be overstated. The agreement, in essence, defines allocation and operating procedures to guarantee the delivery of water through the New Mexico portion of the Project to Texas (EP1) and Mexico based on the quantity of water available for diversion for a given release during the baseline period. The Agreement does not restrict groundwater pumping in New Mexico, but instead requires EBID to deliver sufficient surface water to guarantee that downstream obligations are met. The Operating Agreement offsets the effects of all groundwater pumping in the New Mexico portion of the Project, including those by entities other than EBID. Essentially, EBID is offsetting the effects of all pumping in New Mexico in excess of the 1951-1978 baseline condition. Non-Project entities in New Mexico, including municipal/industrial users, are impairing the Project water supply, and since EBID is required to keep EP1 (geographic Texas) whole under the Operating Agreement, the impacts by non-Project entities are paid for directly by EBID's Project surface water supply.

B. The Rio Grande Project and the Rio Grande Compact

The Project was authorized by act of Congress known as the Rio Grande Project Act of 1905. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814 (1905). The purpose

of the Project was to provide water for irrigation of lands in southern New Mexico and far western Texas, and to fulfill the United States' anticipated treaty obligation to allocate a portion of the waters of the Rio Grande to the Republic of Mexico, which obligation eventually came to fruition in 1906. *See* 1906 Treaty.

Section 8 of the Reclamation Act of 1902 defers to state law for the "control, appropriation, use or distribution of water". Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 (1902). This meant the U.S. Bureau of Reclamation had to obtain a right to use the waters of the Rio Grande from the State of New Mexico for the development of the Rio Grande Project. Pursuant to Section 8 of the Reclamation Act, the United States acquired its water rights for the Project by filing notice, as required by the laws of the Territory of New Mexico. *Letter from B.M. Hall, Dept. of Int. Reclamation Service Supervising Engineer, to David L. White, Territorial Engineer of New Mexico* (Jan. 23, 1906). The U.S. Bureau of Reclamation provided notice to the territorial engineer of its intent to appropriate "a volume of water equivalent to 730,000 acre-feet per year" which would be diverted from Elephant Butte Reservoir "and diversion dams below." Notice of Intent to Appropriate, *supra.* Two years later, the United States supplemented its appropriation with a claim to "all the unappropriated water of the Rio Grande and its tributaries." *Letter from Louis C.B. Hill, Dept. of Int. Reclamation Service Supervising Engineer, to Vernon L. Sullivan, Territorial Engineer of New Mexico* (Apr. 1, 1908).

As discussed, *supra*, EBID is responsible for administration of the New Mexico portion of the Project, under which duty it delivers water to constituents throughout southern New Mexico. After EBID diverts Project water from the river and delivers it to farmlands within the district, a substantial portion of the used water is returned to the river through a drain system that was completed by the United States in 1916. *The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico and Texas, 1936-1937*, 73, 85 (1938). As a result of the transfer of certain works, also discussed, *supra*, EBID now owns and operates the drain system. The drain system was designed as part of the Project to allow used water to be returned to the river, and thus to be re-diverted and reused several times as the river flows through the Project area. The drains work like all groundwater by flowing in paths just below the surface toward the Rio Grande. The drains are deep enough to intersect the groundwater table, and return flows that seep into them back to the main stem of the Rio Grande. These drain and seepage flows are a vital component of the Project because the drain flows and seepage flows are returned to the river for reuse, thus enabling the Project to (typically) divert significantly more water for irrigation use than is actually released from the storage reservoirs. Thus, seepage and return flows are part of the Project water supply and are essential to the ability to fulfill congressional purposes of the Project.

The Rio Grande Compact governs "the use of the waters of the Rio Grande above Fort Quitman, Texas".

Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (1939). While physically in New Mexico, the Lower Rio Grande region consisting of the Rio Grande Project is considered part of "Texas" for the purposes of the Compact. The Rio Grande Compact apportions Rio Grande water between two upstream states, Colorado and New Mexico, by requiring Colorado to deliver a specified quantity of water to New Mexico, and apportions the remaining Rio Grande water between New Mexico above the Rio Grande Project and the Project itself, by requiring New Mexico to deliver a specified quantity of water to the Project. The Rio Grande Compact does not apportion water to Texas, but instead apportions water to the Project, which serves users in New Mexico, Texas, and Mexico. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 385 (D. N.M. 1983). While certain parties and the Special Master may not strictly agree with *City of El Paso*, there is no dispute that the Rio Grande Compact's vehicle for delivery of water to Texas is the Rio Grande Project. Rep. 204; NM Exceptions Brief at P. 16.

The significance of the Rio Grande Compact is that it requires the State of New Mexico to deliver a certain quantity of water to the Project each year based on the amount of water that passes various gauging stations. The Rio Grande Compact contains no provision for allocation of water among Project beneficiaries and, instead, those arrangements are left to the 1906 Treaty with Mexico and, currently, the 2008 Operating Agreement among the United States, EBID, and EP1.

C. Statement of Interest

Throughout the more than one hundred year history of the Rio Grande Project, EBID has entered into numerous contracts with the United States, and EP1. These contracts form the basis of the operations of the Project, and EBID has an interest in protecting the rights derived from these contracts to ensure the future success of the Project and irrigators in southern New Mexico. EBID has an interest in ensuring contract obligations are met, such as those obligations imposed by the 2008 Operating Agreement, which determines the division of the water between the two irrigation districts once water is determined to be Project water. EBID's compliance with contractual obligations of the New Mexico portion of the Project ensures the ability of irrigators to continue to access Project supply.

The Rio Grande Compact, and EBID's interest thereunder, are unique because, under the Compact, Texas agreed to have water delivered to it at Elephant Butte Reservoir, located approximately 100 miles north of the state border, rather than electing to receive delivery of its share of Compact water at the state line. *Elephant Butte Irrigation District v. Regents of New Mexico State University*, 849 P.2d 372, 378 (N.M. Ct. App. 1993). Because Rio Grande Compact water is converted to Project water upon delivery to Texas at Elephant Butte Reservoir, and because EBID is responsible for delivery of the New Mexico share of Rio Grande Project water to irrigators within the State of New Mexico (whose predecessors in interest paid for

the New Mexico portion of the Project) and, further, because EBID is responsible for ensuring delivery of EP1 and 1906 Treaty water under the 2008 Operating Agreement, EBID is uniquely situated and is unlike any other party or Amici in this case. EBID has a direct interest in the protection of Project supply via the Rio Grande Compact, Reclamation law, and/or state law.

The central issue in this case is the interference with Project supply by non-Project water users. The difficulty, and controversy that, in part, led to this case, is in determining what qualifies as "tributary" flows and "seepage and return flows" that were historically present within the Project and that must be protected from interference by non-Project water users. These technical issues will be further developed in this case to determine whether the interests of the Project, and thereby Texas, have been compromised by the interception of certain types of water. EBID has an interest in any determination regarding protection of Project supply for purposes of ensuring that its members are not the only water use sector responsible for meeting administrative requirements imposed to avoid harm to the Project. Any such determination should acknowledge that EBID Project water users, though many have groundwater rights that also qualify them as non-Project water users, making them part of the subset of water users who may be using groundwater in a manner that improperly affects the Project, are the only water users who have offset the affects of their groundwater pumping on the Project to date.

SUMMARY OF ARGUMENT

Numerous arguments have been raised regarding what this Court should or should not allow in this case moving forward. Arguments urging this Court to ignore the entire First Interim Report of the Special Master have also been raised in the Exceptions Briefs. Further, some Amici continue to argue for outright dismissal of the case, a position inconsistent with their own parent State. The arguments against adoption of the full First Interim Report of the Special Master and in favor of unnecessarily restricting the future development of this Original Action should not be entertained by this Court for the reasons stated below.

Specifically, this Court should not be swayed by arguments regarding *Colorado River* abstention for three reasons. First, the Lower Rio Grande Stream Adjudication case does not present issues of abstention because the stream adjudication court has recognized that it does not have the authority to determine administration issues. Second, the Office of the New Mexico State Engineer has a conflict of interest that would prohibit it from entertaining the administration issues raised in this case. Third, there is no risk of re-litigating issues determined by the stream adjudication court, and instead, the Parties and Amici making this argument only do so out of fear of reaching the merits of the issues in this case, rather than in a forum they have more control over. Finally, the arguments in favor of altogether avoiding adoption of the First

Interim Report of the Special Master rely on an incorrect understanding of the procedural posture of this case.

ARGUMENT

A. THE UNITED STATES SUPREME COURT IS THE CORRECT FORUM AND THERE ARE NO *COLORADO RIVER* ABSTENTION ISSUES

The State of New Mexico and some Amici have raised questions regarding the *Colorado River* Abstention Doctrine, as applied to the ongoing Lower Rio Grande Stream Adjudication pending in the Third Judicial District Court for the State of New Mexico, to suggest that this proceeding may not be appropriate. *See Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). In fact, their arguments only speak in terms of "potential" conflict between this case and the stream adjudication court, which, as discussed below, is because there are no actual abstention issues raised by moving forward with this case and, specifically, with moving forward to a determination of whether the Project has suffered harm as a result of action, or inaction, by the State of New Mexico. In this stream system, the Rio Grande Compact and the Rio Grande Project are so interconnected, as are the surface water and groundwater of the Lower Rio Grande, that it would not make sense to avoid a determination of claims of harm to the Project on the basis that such a determination may impact a pending

stream adjudication charged with determining the parameters of the Project water right. Because no conflict exists, this case should proceed to a determination on the merits.

1. The Lower Rio Grande Stream Adjudication Court Has Stated That it Lacks Statutory Authority to Decide the Administration Issues Raised by this Original Action as Part of the Adjudication Process

In 1986, EBID brought an action in New Mexico state court requesting the adjudication of all water users in the Lower Rio Grande. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct.) ("Lower Rio Grande Stream Adjudication").[3] While the action was initially opposed by both the State of New Mexico and the United States, after several years of litigation regarding whether the case could move forward and whether the United States was to be included, the procedural issues were eventually sorted out and the Lower Rio Grande Stream Adjudication proceeded to begin addressing substantive issues. Throughout the last five years, the stream adjudication court has focused on the rights of the United States in the Project. Recently, the presiding judge in the stream adjudication case issued Findings of Fact

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[3] Lower Rio Grande Adjudication, SS-97-104; US Interest (Reverse Chronological Order), https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-reverse-chronological-order.aspx (online docket) (last visited July 24, 2017).

and Conclusions of Law following trial regarding the priority date of the United States' Project right, in which he concluded that the Rio Grande Project carries a priority date under state law of no later than March 1, 1903, thus wrapping up a significant portion of litigation regarding the United States' Project right. EBID has approximately 6,700 members whose interests it is currently representing in the pending stream adjudication case.

The State of New Mexico has argued that the pending Lower Rio Grande Stream Adjudication has determined "all significant aspects of the Project water right". NM Exceptions Brief at P. 42. However, the State of New Mexico further argues the First Interim Report of the Special Master suggests (without saying) that the United States' water right must be adjudicated in this proceeding; therefore, the State of New Mexico urges this Court to limit the United States' participation in this case such that it not be allowed to "re-litigate" its claims already settled by the stream adjudication court. Other Amici have suggested that the correct approach to address this perceived problem would be to dismiss this action altogether, despite the fact that no party has suggested such a solution and each party has acceded to the determination of the Special Master that this case should proceed.

Of particular importance here is the position of the stream adjudication court regarding what constitutes "adjudication" versus "administration". In 2012, the parties participating in the Lower Rio Grande Stream Adjudication briefed the issue of what constitutes the

"source or sources" of Project supply, as the United States claimed an interest in groundwater as part of the Project supply. While EBID believes it is important to clearly define each of the sources and quantities making up the Project supply, the issue came down to a determination of whether this particular request to include groundwater as a source of Project supply of water constituted defining one's water right consistent with what is done in a state stream adjudication, or whether this qualified more as an administrative issue for determination upon a finding of harm to the Project by junior water users. The stream adjudication court determined the latter to be the situation.

While recognizing that reuse of water by capture of seepage and return flows is an essential part of the Project, as with any other Reclamation Project in the Western United States, the stream adjudication court determined that the United States did not state a claim to "groundwater" on that basis, therefore it declined to recognize a "groundwater" right of the United States. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct.), filed Aug. 16, 2012 at 6-7. Despite declining to recognize groundwater as a source of supply for the Project, though simultaneously recognizing the importance of seepage and return flows as a source of supply, the stream adjudication court determined that

the exact quantity the United States and its beneficiaries is entitled to protect as seepage and return flows is a fact-specific determination to be made in a different forum. In ordering that the issue was not proper for a determination by the state adjudication court, as *Amicus Curiae* the City of Las Cruces correctly noted in its Exceptions Brief at P. 11, the court left "the determination of whether Project water retains its identification to administrative proceedings conducted before the State Engineer." *Id.* at 7.

The stream adjudication court, however, did determine that the elements of the United States' water right could be defined under applicable New Mexico law, without specifically setting the quantity of seepage and return flows the United States was entitled to protect from depletion by other water users. Thus, the stream adjudication court's decision left the determination of how much water constitutes Project water to a different forum, which it described as an "administrative proceeding conducted before the [New Mexico] State Engineer." Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (N.M. Third Jud. Dist. Ct.), filed Aug. 16, 2012 at 7. In other words, the stream adjudication court decided that the language of the New Mexico adjudication statute regarding the information that must be included in a water rights decree did not require a determination of when and how to protect tributary waters of the Rio

Grande or seepage and return flows of the Project. *Id* ("The scope of the adjudication, in contrast, is more limited, focusing on defining the elements of the right. NMSA 1978 §72-4-19 (1907), stating that an adjudication decree shall declare, as to the water right adjudicated to each party, the priority, amount, purpose, periods and place of use, and as to water use for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.") (internal quotation marks omitted). The stream adjudication court specifically said such an inquiry would be technical and fact specific, and was therefore more appropriate for another forum. The stream adjudication court's determination that it did not have to decide issues related to quantity of seepage and return flows to be protected for the Project was a determination that there are no abstention concerns if this Original Action moves forward. As such, this case should proceed.

2. The New Mexico Office of the State Engineer Has a Conflict of Interest That Would Prevent it from Making Administrative Determinations Regarding Protection of the Rio Grande Project

In New Mexico, the agency known as the Office of the State Engineer is responsible for managing the State's water uses to ensure that the principles of prior appropriation are met. The New Mexico Statutes dictate that the State Engineer shall have "general

supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required." New Mexico Statutes, ch. 73, Art. 2, §72-2-1 (1978). More specifically, "the State Engineer shall have the supervision of the apportionment of water in this state according to the licenses issued by him and his predecessors and the adjudications of the courts." New Mexico Statutes, ch. 73, Art. 2, §72-2-9 (1978). The State Engineer also has the power to adopt regulations to implement or enforce the statutes he has a duty to administer (including the groundwater statutes). New Mexico Statutes, ch. 73, Art. 2, §72-2-8 (1978). In addition, "any regulation, code or order issued by the State Engineer is presumed to be in proper implementation of the provisions of the water laws administered by him." *Id.* "The legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him." *State ex rel. S.E. Reynolds v. Aamodt*, 800 P.2d 1061 (N.M. 1990).

If, following determinations of what constitutes Project supply and whether the State of New Mexico has improperly interfered with Project supply (and thus Texas' Compact share of water), New Mexico is found to have acted or failed to act in a way that has harmed the Project, various remedies are available to curtail New Mexico's interference with the Project, including suspension of its administrative control. Even though the New Mexico Statutes purport to create broad jurisdiction over the public waters of the State, those powers might not be broad enough for the State Engineer to retain control over groundwater within

the Lower Rio Grande area if his actions are contrary to the express purposes of the Rio Grande Compact and the Rio Grande Project.

The State of New Mexico's administrative options, despite being broad in scope according to New Mexico law, are inadequate to address the issues raised here. On the one hand, the State Engineer must administer in a manner that will ensure the appropriate amount of water reaches the Elephant Butte Reservoir as required by the Rio Grande Compact. On the other hand, the State Engineer is also responsible for allowing the development of groundwater in the Lower Rio Grande (the geographic area that encompasses the Project). It is the groundwater users within the Lower Rio Grande that are alleged to be the direct cause of the loss of Project water, and thus the cause of the harm to Texas and the Project. New Mexico Statutes have set up various procedures afforded water right holders to seek protection of their water right from impairment by others. In all such cases, the water right holder must submit to the jurisdiction of the New Mexico Office of the State Engineer if it seeks to protect its water right. Such a process was what was envisioned by the stream adjudication court when it determined that quantifying seepage and return flows was an administrative issue rather than an adjudication issue.

Multiple issues are raised by a conclusion that the State of Texas should be required to protect its Rio Grande Compact interests before the State agency alleged to be responsible for the harm claimed by Texas. Further, EBID has consistently complained across

multiple forums of the lack of administrative procedures necessary to protect the Project water supply, together with the State of New Mexico's continued support of, and bias toward, municipal and industrial users who continue to pump water to the direct detriment of the Project and its beneficiaries. To conclude that the State of New Mexico should retain jurisdiction to determine whether the Project, and thereby Texas, have been harmed by its own actions is contrary to hundreds of years of Compact law. Interference with Project supply is crippling the Project and, specifically, the supply available to EBID given the change in allocation procedures set out in the 2008 Operating Agreement. A New Mexico administrative agency with a history of failure to act cannot possibly be the only place to seek protection of the Rio Grande Project.

Finally, as multiple Amici point out, the New Mexico Office of the State Engineer is in a conflict situation regarding the merits of this case by reason of its duty to the entire State of New Mexico in water rights administration. As discussed, *supra*, the State of New Mexico must comply with the Rio Grande Compact, which was designed to ensure water is delivered to the Rio Grande Project, while the New Mexico Office of the State Engineer has historically allowed the virtually unchecked development of groundwater to the detriment of the Project. While Amici would prefer to see this Original Action dismissed in order to avoid the potential conflict, the opposite solution, the one in which this Original Action proceeds and New Mexico, including the Office of the State Engineer, is divested of its

authority to make administrative determinations regarding the Project, is also a vehicle for avoiding a harmful conflict situation.

The State of New Mexico itself has determined that this Original Action is a more appropriate forum, thereby eliminating the need for further discussion regarding whether Rio Grande Compact states should be required to present their case for harm to the Project and their interests in a New Mexico administrative forum. Given that New Mexico has acceded to allowing this Court to determine the issues raised in the Texas and United States Complaints, no determination must be made at this time regarding the appropriateness of the highly prejudicial nature of the administrative proceedings deferred to by the stream adjudication court. Likewise, this Court should not be swayed by the arguments of Amici that continue to request dismissal of this action altogether, and instead should proceed on the basis of the State of New Mexico's concession that this forum is the correct forum.

3. In Determining Whether the Rio Grande Project, and Thereby Compact Texas, Has Been Harmed by the State of New Mexico, There Is No Actual Risk of Relitigation of Various Issues

It is correct to say that in this Original Action, a determination of what constitutes Project supply is necessary prior to a determination of whether the State of New Mexico has improperly interfered with

the Project supply and thereby breached its Rio Grande Compact obligations. Some of those parameters have been set by the stream adjudication court already; the remainder it has declined to address. The State of New Mexico argues the United States should not be allowed to re-litigate its water right in this forum, even though it concedes that the United States is seeking a determination regarding the tributary/return flow depletions that are affecting the Project supply. While the State of New Mexico may be correct that the United States cannot "re-litigate" various issues already determined by the stream adjudication court, what must happen here is not a re-litigation of claims as much as it is a development of technical issues the stream adjudication court determined it could not decide.

The State of New Mexico is correct that state courts are the proper location for adjudicating water rights, including that of the United States (NM Exceptions Brief at P. 14), however the stream adjudication court declined to determine whether Project water is being improperly interfered with (intercepted), calling that issue one of administration. Thus, this proceeding cannot possibly interfere with what the stream adjudication court is doing since the adjudication court has declined to hear these technical issues. Even the State of New Mexico now agrees that, to the extent this controversy involves a determination of whether the United States' Project right has been depleted, this is the appropriate forum for hearing said controversy. This Court should not read too much into the State of

New Mexico's argument that a re-litigation of claims may occur, especially since the Special Master has not said as much, and because, if accepted, such an argument could lead to a conclusion that either never allows the litigation of claims of harm to the Project, or would require such litigation to occur in an administrative forum incapable of resolving the ultimate issues.

Any limitation of the future issues in this case would be premature at this time and, instead, this Court should elect to proceed with a full and fair development of all issues necessary to determine if the State of New Mexico has improperly impacted Texas and the Rio Grande Project. If the State of New Mexico is taking water from the Project, it is taking water from Compact Texas. To the extent that the State of New Mexico is improperly interfering with Project supply, this Court has jurisdiction to enjoin such interference. After more than thirty years of intermittent litigation on this issue, EBID wishes to see the protection of seepage and return flows for the Project, and through the process set up by the Complaints of Texas and the United States, that is exactly what will, and should, happen here.

B. THE FIRST INTERIM REPORT OF THE SPECIAL MASTER SHOULD BE ACCEPTED SUBJECT TO FURTHER DEVELOPMENT OF THE ISSUES DISCUSSED IN THE REPORT

The First Interim Report of the Special Master should not be completely disregarded as certain parties and Amici have suggested. While EBID does not agree wholesale with all findings and conclusions contained in the First Interim Report, and instead EBID believes the Report contains several incorrect statements of fact, the First Interim Report should nonetheless be adopted in whole. However, because of its concerns, EBID reserves its right to address the substantive issues on which there is disagreement at a more appropriate stage of the proceedings. The arguments put forth in favor of disregarding the First Interim Report, either in whole or in part, suggest that the main reason supporting setting aside the Report is that various issues have not yet been completely developed. While there remains work to be done in this case, the First Interim Report of the Special Master should not be disregarded on the basis that the merits have not yet been completely developed. The appropriate course of action is to accept the First Interim Report and its recommendations, subject to further development as necessary and proper to completely address the merits of the case.

1. The Procedural Posture Lends Itself to a Determination That the First Interim Report of the Special Master Is Not a Final Determination of Any of the Claims or Defenses at Issue

Pursuant to Supreme Court Rule 17.2, discussing procedure in an Original Action, the rule states "the form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed." Sup. Ct. R. 17.2. Accordingly, the State of New Mexico filed two motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). A different standard applies to Motions to Dismiss than applies to Motions for Summary Judgment, and despite the atypical review of historical documents performed by the Special Master, he nonetheless applied the standard for considering Motions to Dismiss. Thus, the Motions to Dismiss were not converted to Motions for Summary Judgment as suggested by various Amici.

Several Federal Courts have discussed the purpose of the Rule 12(b)(6), its standard of review, and the ultimate effect of a determination under the rule, all of which are informative here. First, the Federal District Court for the Western District of Oklahoma in *Briggs v. Oklahoma ex rel. Dep't of Human Servs.*, 472 F. Supp. 2d 1288 (W.D. Okla. 2007) said:

> It is not the objective of Rule 12(b)(6) to formulate issues for trial. That function is discharged by pretrial discovery. Furthermore, the Court's task at this stage "'is not to weigh

> potential evidence that the parties might present at trial,'" *Tal v. Hogan*, 453 F.3d 1244, 1252 (10th Cir.2006) (quoting *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1236 (10th Cir.1999)), or decide whether Briggs will ultimately prevail against this defendant. Rather, the Court's task is "'to assess whether . . . [Briggs' second amended] complaint alone is legally sufficient to state a claim for which relief may be granted.'" *Id.* (quoting *Sutton*, 173 F.3d at 1236).
>
> *Briggs v. Oklahoma ex rel. Dep't of Human Servs.*, 472 F. Supp. 2d 1288, 1290 (W.D. Okla. 2007).

As this case correctly points out, the function of the court in considering a motion to dismiss is extremely limited.

The Federal District Court for the District of Massachusetts has also provided a comprehensive statement regarding the ultimate effect of a ruling on a motion to dismiss in a situation where the record has not been completely developed. In *Fin. Res. Network, Inc. v. Brown & Brown, Inc.*, 754 F. Supp. 2d 128 (D. Mass. 2010), it said:

> The law of the case doctrine has two branches. *Remexcel Managerial Consultants, Inc. v. Arlequin*, 583 F.3d 45, 53 (1st Cir.2009); *see Ellis v. United States*, 313 F.3d 636, 646 (1st Cir.2002) (same). This case falls under the more flexible branch. Under that branch, the doctrine constrains "but does not altogether prohibit [] reconsideration of orders within a

single proceeding by a successor judge." *Ellis v. United States*, 313 F.3d at 646 (also explaining policies behind prohibition against reconsideration); *accord Flibotte v. Pennsylvania Truck Lines, Inc.*, 131 F.3d 21, 25 (1st Cir.1997) ("not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work manifest injustice"). Reconsideration is permissible "if the initial ruling was made on an inadequate record or was designed to be preliminary or tentative[,] . . . there has been a material change in controlling law [or] . . . newly discovered evidence bears on the question." *Ellis v. United States*, 313 F.3d at 647–648. Avoidance of manifest injustice may also provide a basis for reconsideration. *Id.* at 648. Nonetheless, "neither doubt about the correctness" of the first ruling "nor a belief that the litigant may be able to make a more convincing argument the second time around will suffice to justify reconsideration." *Ellis v. United States*, 313 F.3d at 648 (further noting that "there is a meaningful difference between an arguably erroneous ruling . . . and an unreasonable ruling that paves the way for a manifestly unjust result").

Fin. Res. Network, Inc. v. Brown & Brown, Inc., 754 F. Supp. 2d 128, 154-55 (D. Mass. 2010).

That same Massachusetts court went on to explain that:

> The circumstances are more compelling when faced with an initial denial of a motion to dismiss and a subsequent summary judgment motion. A motion to dismiss addresses the plausibility of the claims in the complaint and assumes facts therein as true whereas a motion for summary judgment addresses whether genuine issues of material fact exist to support the claims. A different factual record and a different standard of review govern summary judgment motions. The facts in the Rule 12(b)(6) record while similar are not identical to those in the summary judgment record. A different legal standard of review also applies when assessing the merits of defendants' summary judgment motions. *See McAnaney v. Astoria Financial Corp.*, 2009 WL 3150430, *7 (E.D.N.Y. Sept. 29, 2009) ("because of the divergent standard of review applicable to motions to dismiss and motions for summary judgment, the law of the case doctrine is inapposite to the Court's analysis of whether, after the close of discovery, genuine issues of fact have been raised which survive summary judgment"). Pretrial rulings are oftentimes designed to be preliminary and, as such, a "[d]enial of a motion to dismiss may be followed by an order granting dismissal, or – in the very nature of the difference between a ruling on the pleadings and an examination of the record – an order granting summary judgment." 18B Charles Alan Wright, Arthur R.

Miller and Edward H. Cooper, Federal Practice and Procedure §4478.1 (2nd ed.).

Id. at 155.

The nature of the pending motions is to require the Special Master to make preliminary determinations without the benefit of complete development of the case – the State of New Mexico invited such determinations when it filed its motions to dismiss. We disagree with New Mexico that, after having invited the Special Master to make legal conclusions, which he did, the First Interim Report should not be accepted. The First Interim Report of the Special Master should be accepted, subject to further appropriate legal and factual development as the matter proceeds to trial.

2. The First Interim Report of the Special Master Should Be Accepted by this Court Subject to Further Development of the Substantive Issues as Contemplated by the Federal Rules of Civil Procedure

Future development of the issues will not be hindered by acceptance of the full First Interim Report of the Special Master. The ultimate merits of the case are not currently before this Court, rather, the Special Master's conclusions regarding the four procedural motions are what are pertinent at this moment, and complete development of the issues is yet to come. The State of New Mexico's (and others') arguments that certain conclusions should not be accepted is incorrect and inconsistent with the Rules of Civil Procedure and,

further, there is no need for such a decision. The Amici spend a lot of time putting forward two forms of arguments. First, they make arguments that were fully developed in briefing to the Special Master and which the Special Master has already rejected. Such arguments fall into the category discussed by the Massachusetts Federal District Court, which it labeled "arguably erroneous." *Fin. Res. Network, Inc.*, 754 F. Supp. 2d at 155. The other set of arguments made discuss items that will be further developed when this case moves forward on the merits now that procedural jockeying is almost complete. Both sets of arguments are inappropriate before this Court at this stage, and any issues remaining should first be presented to the Special Master.

The First Interim Report of the Special Master should be accepted as preliminary, and subject to further proceedings as necessary to completely analyze all of the issues raised by the Complaints of Texas and the United States. Full and fair development of the issues is necessary, and the Special Master's First Interim Report and decisions regarding the pending motions should be accepted as preliminary, consistent with case law addressing the Rules of Civil Procedure.

CONCLUSION

EBID has a direct interest in the merits of the claims raised in this Original Action by virtue of its ownership of Rio Grande Project facilities, its interests

in contracts governing the Project functions, and its members' interests in the continued use of both Project supply and groundwater. The First Interim Report of the Special Master should be accepted, and this case should proceed to resolution on the merits. All arguments against the adoption of the First Interim Report, or certain portions of it, should be dismissed, and instead the First Interim Report should be accepted and this case should be allowed to proceed to a full and fair development of the issues.

Respectfully submitted,

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